WATTA BATTERY INDUSTRIES SDN. BHD.

v.

UNI-BATT MANUFACTURING SDN. BHD. AND CHOW SIEW HON & 4 ORS. (INTERVENERS)

HIGH COURT, KUALA LUMPUR
T. SELVENTHIRANATHAN JC
[COMPANIES (WINDING-UP)
NO. D3-28-491-1989]
24 AUGUST 1992

COMPANY LAW: Compulsory winding-up - Petition to wind - up company - No opposition - Civil suit filed by petitioner while petition to wind-up pending hearing - Winding-up order made - Application for leave to proceed with action - Section 226(3), Companies Act 1965 - Liquidators granted power to settle debts and distribute surplus funds to shareholders - Sections 236 and 237 - Petitioner's submission of proof of debt rejected - Letter giving notice of rejection signed by one of two liquidators - Effect - No appeal from rejection; application to set aside order of court and to defer distribution of funds until civil suit disposed of - Whether petitioner had locus standi - Whether petitioner creditor and contributory - Petitioner not notified of application of liquidators under ss. 236 and 237 - Whether application made ex parte - Rule 64, Companies (Winding-Up) Rules 1972.

PRACTICE AND PROCEDURE: Application to stay order of court pending appeal - No special circumstances existing - Whether order for stay should be granted - Whether order would be to detriment of shareholders.

On 13 October 1989 a petition for the winding-up of the respondent company was presented. The petitioner filed a civil suit against the company on 1 August 1990 for breach of contract. A winding-up order was made on 21 February 1991. The petitioner applied on 20 June 1991 for leave of the Court under s. 226(3) of the Companies Act 1965 ("the Act") to proceed with the action ("the first application"). On 31 March 1992, the liquidators of the company applied for and obtained orders empowering them, *inter alia*, to settle the debts of the company, to distribute the surplus funds amongst the shareholders, and to compromise by way of set-off the debts due from the shareholders to the company from the payment to be made to them. The petitioner refused to settle a debt owed by it to the company on the ground that it had a claim against the company far in excess of the amount owed to the company. It filed proof of debt with the liquidators which was rejected by a letter dated 13 December 1991, signed by one of the two liquidators. No appeal was filed against the rejection. The time limit for appealing had lapsed but the petitioner's first application was still pending. On 27 June 1992, the petitioner applied on a certificate of urgency for an order to set aside the order of the Court made on 31 March and for the distribution of the company's assets to be deferred until the outcome of the hearing of the civil suit ("the second application").

During submissions, an oral application was made on behalf of the petitioner for the Court to extend the time for appealing under rr. 93 and 193 of the Companies (Winding-Up) Rules 1972 ("the Rules"), the failure to appeal being procedural only. On the decision to the two main applications being given, an application was made for a stay of the order of the Court for the distribution of the company's assets pending appeal.

Held:

A. Both the first and second applications should be dismissed.

Regarding the second application:

1. The petitioner lacked *locus standi*. The application was made by the petitioner *qua* petitioner and not as a creditor or contributory of the company. Section 243(1) of the Act empowers the Court to make an order staying winding-up proceedings, but the only persons who can so apply after a winding-up order has been made are the liquidator or any creditor or contributory of the company, and only if it can be proved to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed. The petitioner was not a creditor within the meaning of that expression for the purpose of s. 243(1). It was not a creditor of the company by virtue of the civil suit. It could have come within the meaning of a creditor if it had proved its debt before the liquidators or had obtained judgment against the company in the civil suit.
2. The application by the liquidators which resulted in the order dated 31 March 1992

was not made *ex parte* the petitioner. There was no requirement under the law for the petitioner to be notified of such an application. Under ss. 236 and 237, only a creditor or contributory may apply to the Court with respect to any exercise or proposed exercise by the liquidator of the powers conferred under those sections, and a liquidator may apply for directions. Furthermore, under r. 64(1) of the Rules, even as a contributory or proven creditor of the company, the petitioner would have had to make a written request to be given notice of the proceedings and would have only received such notice upon payment of the costs occasioned thereby.

Regarding the first application:

1. The petitioner could obtain the relief it sought in the civil suit in the winding-up proceedings. It was the petitioner which had presented the petition and also instituted the civil suit against the company while the petition was pending hearing. The reason for applying for the winding-up of the company through the petition and the instituting of the civil suit had certain features in common. The philosophy behind such provisions as contained in ss. 222 and ss. 226(3) of the Act and r. 163 of the Rules, in the case of compulsory winding-up, is to bring into one forum all actions and proceedings against the company so that they can conveniently and expeditiously be dealt with, whilst minimising costs by preventing a multiplicity of actions which may result in the assets of the company being dissipated.
2. The letter giving notice of the rejection of the petitioner's proof of debt was not bad in law. Though signed by only one liquidator, it was couched in clear terms that it was conveying the decision of the liquidators made jointly.
3. Having set the winding-up machinery in motion, the petitoner had to face the consequences of its action. Furthermore, it had chosen to seek a remedy in the winding-up proceedings by submitting its proof of debt to the liquidators. Upon the proof of debt being rejected, it was open to the petitioner to apply to the Court under s. 279 of the Act and r. 93 of the Rules to reverse the decision of the liquidators. A creditor who has selected one method of having his claim adjudicated upon, which gives him the right to question the decision of the liquidator, ought not then to be in a position to select another method of adjudication. In any event, a decision in the action would have no result, as the liquidator's adjudication would still remain until it was reversed by a Judge.

B. The application for a stay of the order for the distribution of the company's assets pending appeal ought to be allowed.

Though no special circumstances were shown to warrant a stay, an order staying the distribution of the company's assets should be granted. The assets of the company in the form of monies which had been realised had in accordance with the law been deposited into an interest-bearing account by the liquidators. The balance of convenience dictated that they so remained. The order for stay in these circumstance would not be to the detriment of the shareholders, should the appeal not succeed, as they would be compensated for the delay through the interest that the assets would earn in the interim.

[The first two applications dismissed with costs]

Cases referred to:

Re R-R Realisation Ltd. (formerly Rolls-Royce Ltd.) [1980] 1 All ER 1019 ***(foll)***

Mosbert Berhad (In Liquidation) v. Stella D'Cruz [1985] 2 MLJ 446 ***(foll)***

Png Siaw Luan v. Wong Tui San & Ors. [1990] 3 MLJ 340 ***(foll)***

Lesco Development Corp. Sdn. Bhd. v. Malaysia Building Society Bhd. [1988] 2 MLJ 184 / [1987] 2 CLJ 290 ***(foll)***

Re Aro Co. Ltd. [1980] 1 All ER 1067 ***(foll)***

Craven v. Blackpool Greyhound Stadium & Racecourse Ltd. [1936] 3 All ER 513 ***(foll)***

Re Canada Western Steel Co. [1922] 69 DLR 689 ***(foll)***

Re Cuthbert Lead Smelting Co. Ltd [1886] WN 84 **(foll)**

Legislation referred to:

Companies Act, 1965, ss. 216(3), 222, 226(3), 236(1)(c) & (3), 237(3), 243(1), 279, 292(1)

Companies (Winding-Up) Rules, 1972 rr. 64, 93, 94, 95, 101, 193

Other sources referred to:

Palmer's Company Law Vol. 1, twenty-fourth edition paragraphs 75-88

The Law of Company Liquidation by the Hon. Mr. Justice B H McPherson, third edition by J O'Donovan at 390, rr. 94 and 95

Jowitt's Dictionary of English Law, second edition, by John Burke

For the petitioner - M. Pathmanathan and subsequently Terrance Marbeck; M/s. Yusuf Lee Pathma & Marbeck
For the respondent - P. S. Khoo and subsequently K. Balaguru with her; M/s. P.S. Khoo & Associates
For the interveners - David Morais; M/s. Sri Ram & Co.

JUDGMENT

T. Selventhiranathan JC:
A petition (enclosure (1)) for the winding up of the respondent company ("the company") was presented on 13 October 1989. An order for its winding up was made on 21 February 1991. The Company, and its contributories who had given notice of intention to oppose the petition, did not oppose the making of the order.

After the presentation of the petition and prior to the making of the winding-up order, the petitioner as plaintiff had, on 1 August 1990, filed in the commercial division of the High Court civil suit D1-22-1171-90 ("the civil suit") against the company as defendant. In it the petitioner claimed special and general damages, interest and costs. The claim was grounded on an alleged breach of contract by the company in the supply of battery casings to the petitioner. The sum originally claimed under the head of special damages was RM2,093,799.93 but this was amended to RM1,585,850.60 on 2 October 1990 as the petitioner admitted owing the company a sum of RM507,949.36 for goods supplied.

A cursory look at the petition reveals that among the particulars given of mismanagement of the company making it just and equitable for it to be wound up was the purchasing of lead inserts from Tai Kwong Battery Industries Sdn. Bhd. without those responsible for the management of the company, except for the petitioner's representative, revealing their interest in the said vendor company "particularly since the said lead inserts could be purchased elsewhere at a lower price". Another particular of mismanagement alleged was that the company arbitrarily stopped the supply of battery casings to the petitioner whilst maintaining a supply to itself. In the light thereof, it is immediately apparent that these particulars of reasons advanced for the winding up of the company also formed the basis of the claim in the civil suit.

Subsequent to the winding-up order the petitioner applied (*vide* enclosure (33)) on 20 June 1991 for leave of the Court under s. 226(3) of the Companies Act 1965 to proceed with the action against the company. It appears from the file that this application ("the first application") was adjourned from time to time until it was fixed for hearing before me on 8 July 1992.

For convenience, any reference hereinafter to "the Act" or "the Rules" means a reference to the Companies Act 1965 or the Companies (Winding-Up) Rules 1972 and any reference to a section or rule by itself is a reference to a section or rule of the Act or Rules respectively.

In the meantime, on 31 March 1992, the liquidators of the company applied for (*vide* enclosure (44)) and obtained orders empowering them -

(a) to settle in full the debts due and owing to all secured creditors of the company;
(b) to pay in full all payments classified under s. 292(1) which were due and owing;
(c) to settle or pay in full all the creditors of the company who had filed proofs of debt which had been admitted by the liquidators;
(d) to distribute amongst the shareholders in proportion to their respective shareholdings in the company the surplus of the funds or assets of the company after the payments mentioned in the foregoing paragraphs;
(e) to compromise with the shareholders of the company by way of set-off the debts due from them to the company from the payment to be made to them from the said surplus;
(f) to pay the costs of the application in priority under s. 292(1).

The affidavit of Ong Kong Lai (enclosure (43)) affirmed on behalf of himself and the other liquidator Wong Cham Mew in support of the above application stated that pursuant to the order of the Court for the winding up of the company, its assets had been disposed of, and the monies realised from the proceeds of sales had been banked into a special interest-bearing account. The amount realised from the sale of assets and recovery of some of the debts due from the company's debtors amounted to RM952,369.35. Some other debtors still owed the company RM53,465.11. Besides these other debtors, the shareholders of the company owed it various sums as follows:

(a) Tai Kwong Battery Industries Sdn. Bhd. owed RM315,013.92;
(b) Tanite Battery Co. Sdn. Bhd. owed RM248,975.97;
(c) Watta Battery Industries Sdn. Bhd. (the petitioner or "Watta") owed RM507,949.36.

The debts owed by the shareholders totalled RM1,071,939.20. The liquidators were endeavouring to recover the debts due from the other debtors. However, the process of recovery of the said debts was expected to take time and was likely to delay the winding up and eventual dissolution of the company.

It was also deponed that even without the said debts being recovered, the liquidators were in a position to settle in full all the creditors and make preferential payments under s. 292(1), and still have a surplus for distribution among the shareholders.

By paragraphs 16 to 18 of the affidavit it was confirmed that there were no appeals to the Court from the decision of the liquidators pertaining to the admission and/or rejection of all proof(s) of debt filed against the company. As for the shareholders, except for the petitioner, the others had written asking to set-off the sums owed by them to the company from the amount due to them as per their shareholding from the surplus funds to be distributed to the shareholders. The order of the Court was therefore sought to compromise with the shareholders by setting-off the monies due from them from the monies due to them and to pay them only the deferential (sic) sum.

It was further deponed in paragraphs 19 to 26 that the petitioner had refused to settle the debt owed on the ground that it had a claim against the company far in excess of the amount owed to the company. The petitioner had filed a claim (i.e. the civil suit) for damages amounting to RM1.5 million for an alleged breach of contract. When the company was wound up, the petitioner's first application had been made, and the petitioner claiming to be a creditor of the company had also filed proof of debt with the liquidators which was rejected, and there was no appeal against that decision. The time limited for appealing had also lapsed but the petitioner's first application was still pending. The order of the Court was therefore sought to set-off the amount due from the petitioner from the payments due to it from the surplus funds. All notices to be sent under the Rules had been complied with and the liquidators had reached the final stages of the winding-up process.

On 27 June 1992 the petitioner filed an application ("the second application") (enclosure (49)) on a certificate of urgency for an order to set aside the order of the Court made on 31 March 1992 on the application (enclosure (44)) of the liquidators and for the distribution of the company's assets among the shareholders to be deferred until the outcome of the hearing of the civil suit.

The second application was supported by the affidavit (enclosure (49A)) of Chong Ah Goh, a director of the petitioner, who adverted to the claim for damages amounting to RM1.5 million against the company in the pending civil suit. He stated that the proof of debt filed by the petitioner had been rejected by the liquidators but no appeal was made to the Court against the rejection in view of the pending civil suit in respect of which leave to proceed had been sought. The amount alleged due and owing to the company from the petitioner was the subject-matter of a set-off in the civil suit and therefore the alleged debt of the petitioner to the company must await the outcome of the civil suit. However, the order made on the application by the liquidators had pre-empted the petitioner's right of redress to the Court and compromised the same.

Chong Ah Goh then went on to depone that the application by the liquidators had been made without any notice to the petitioner and thus deprived it of any opportunity to be heard on a matter directly affecting its pecuniary interest. He concluded by alleging that the liquidators "had acted *mala fide* and/or in a manner prejudicial to the petitioner and/or hence interfered with the due process of the proceedings relating to the said civil suit".

Subsequent to this second application by the petitioner, five contributories of the company applied (*vide* enclosure (55)) supported by (enclosure (55A)) for, and by consent were granted, leave to intervene in these proceedings.

I then proceeded to hear arguments on the second (enclosure (49)) and first (enclosure (33)) applications, in that order. However, there was overlapping of submissions owing to the nature of the applications.

Mr. Balaguru for the liquidators raised the preliminary objection that the petitioner lacked the necessary *locus standi* to make the second application as it had no more interest in the matter after the winding-up order had been made and the only persons having an interest would be the creditors and the contributories of the company. He also argued that the petitioner

could not in law halt winding-up proceedings which had reached the stage where only the distribution of the company's assets to the shareholders remained.

Mr. Pathmanathan for the petitioner contended in reply that even though the petition was presented by Watta as petitioner, it also was a shareholder and contributory of the company. The second application was made by the petitioner as a creditor of the company in relation to the civil suit where the petitioner's claim had not been satisfied. All that the petitioner sought was a deferment of the distribution of the company's assets to the shareholders until the civil suit was disposed of. As a creditor and contributory having rights against the company any party was entitled to make an application at any time to have its interests protected. He further argued that the petitioner was a creditor by virtue of the civil suit which had been filed claiming against the company damages for breach of contract in the region of RM1.5 million.

It was also argued for the petitioner that when its proof of debt was rejected by the liquidators, it had informed them that it was not appealing against their decision but would instead be pursuing its claim through the pending civil suit. In these circumstances the petitioner had accordingly not relinquished its right to proceed with the civil suit but had instead reserved such right. However, the liquidators had proceeded *ex parte* with the application to distribute the realised assets of the company. Mr. Pathmanathan therefore contended that the petitioner was entitled *ex debito justitiae* to set aside the order made on the liquidators' application under O. 32, r. 6 of the Rules of the High Court 1980. If the petitioner had had notice of that application, it would have appeared and objected to the making of the order. Since the order had been made *ex parte,* it had to be remedied. Otherwise it would have the effect of totally and finally extinguishing the petitioner's just claim.

Mr. Pathmanathan contended further that the petitioner did not appeal against the decision of the liquidators because to do so would result in a duplicity of the very same cause of action and would amount to an abuse of the process of the Court. Where there are two parallel actions, one should be stayed and the other allowed to proceed. In the present case, since the civil suit had already been proceeded with and an application for summary judgment was pending, it was more convenient and cost-saving to proceed with the civil suit than to appeal.

A further argument advanced was that as the rejection of the proof of debt was signed by only one of the two liquidators, namely Wong Cham Mew, the decision was his only and bad in law. Finally, Mr. Pathmanathan made an oral application for the Court to extend the time for appealing under rr. 93 and 193, the failure to appeal being procedural only.

He cited as authority for his various contentions the cases of *Re R-R Realisation Ltd. (formerly Rolls-Royce Ltd.)* [1980] 1 All ER 1019, *Mosbert Berhad (In Liquidation) v. Stella D'Cruz* [1985] 2 MLJ 446, *Png Siaw Luan v. Wong Tui San & Ors.* [1990] 3 MLJ 340, *Lesco Development Corp. Sdn. Bhd. v. Malaysia Building Society Bhd.* [1988] 2 MLJ 184 and *Re Aro Co. Ltd.* [1980] 1 All ER 1067. He also referred to **Palmer's Company Law Vol. 1**, twenty-fourth edition paragraphs 75-88 and **The Law of Company Liquidation** by the Hon. Mr. Justice B H McPherson, third edition by J O'Donovan at 390.

Mr. Balaguru for the liquidators contended in reply that once the order for winding up had been made, the petitioner ceased to have any interest in the matter. Its claim of coming in as a creditor of the company did not in fact make it a creditor. The creditors of the company were determined when the liquidators closed the register to the exclusion of anyone who had not proved his debt in accordance with the law. The liquidators would stop or could not go on with the distribution only if the formality of the proof of debt was not concluded. In this case as there had been no appeal against their decision, the liquidators proceeded to comply with r. 101 and in such a case there was no provision of law empowering the Court to stop the winding-up machinery. In a compulsory winding up, as was the case here, the creditor was obliged to submit to the procedural scheme for winding up provided under the Act and the Rules and two simultaneous actions were not to be allowed. He cited *Craven v. Blackpool Greyhound Stadium & Racecourse Ltd.* [1936] 3 All ER 513 in support.

He submitted further that as the petitioner had made a deliberate decision not to appeal against the decision of the liquidators rejecting its proof of debt, it could not now apply to the Court for

an extension of the time within which to appeal. The law required all claimants against the company to assert their claims within the procedural scheme of the Rules to prevent duplicity or multiplicity of claims. He distinguished the cases cited on behalf of the petitioner.

On the preliminary objection raised that the petitioner lacked the necessary *locus standi* to make the second application, I was of the view that the objection was well-founded. The second application was made by the petitioner *qua* petitioner and not as a creditor or contributory of the company. Section 243(1) empowers the Court to make an order staying winding-up proceedings. It reads:

> At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

This provision makes it clear that the only persons who can apply for a stay of all proceedings in relation to a winding up after an order for winding up has been made are the liquidator or any creditor or contributory of the company and even then such an order can only be made if it can be proved to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed.

It was contended that the petitioner was a creditor of the company by virtue of the civil suit and therefore could apply for a stay in that capacity.

With respect, I do not agree with learned Counsel for the petitioner on his interpretation of who a creditor is. In my view the petitioner was not a creditor of the company within the meaning of that expression for the purpose of s. 243(1). **Jowitt's Dictionary of English Law**, second edition, by John Burke defines a "creditor" as "a person to whom a debt is owing by another person, called the debtor". The same dictionary states under the definition of "debt":

> A debt exists when a certain sum of money is owing from one person (the debtor) to another (the creditor) ...
> Debt' denotes not only the **obligation** of the debtor **to pay**, but **also** the **right** of the creditor **to receive and enforce payment**
>
> (Emphasis added)

Therefore before the petitioner could apply for a stay under s. 243(1), it had to be a creditor of the company. However, it could only come within the meaning of a creditor if it had proved its debt before the liquidators or had obtained judgment against the company in the civil suit. Otherwise it would remain a person claiming to be a creditor (see, for example, s. 236(1)(c) where the phrase "creditors or persons claiming to be creditors or having or alleging themselves to have any claim ... is used).

The order of the Court of 31 March 1992 (which was sought to be set aside by the second application) was made pursuant to ss. 236 and 237 which provide for a liquidator to do any number of things specified therein. In this context the exercise by the liquidator of the powers conferred by s. 236 is subject to the control of the Court, and any creditor (into which category the petitioner does not fall for the reasons earlier stated) or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers. Under s. 237(3) the liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.

In these circumstances the application by the liquidators which resulted in the order dated 31 March 1992 was not made *ex parte* the petitioner as there is no requirement under the law for the petitioner to be notified of such an application so that it can be heard before an order is made. I am further fortified in the view I take herein by r. 64 which reads:

> (1) Every person for the time being on the list of contributories of the company and every person whose proof has been admitted shall be at liberty at his own expense to attend proceedings in relation to the winding-up of a company by the Court, and shall be entitled upon payment of the costs occasioned thereby to have notice of all such proceedings as he shall by written request require.
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> (2) If the Court is of the opinion that the attendance of any such person as aforesaid upon any proceedings has occasioned additional costs which ought not to be borne by the funds of the company it may direct the costs or a gross sum in lieu thereof to be paid by that person and that person shall not be entitled to attend any further proceedings until he has paid the costs.
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> (3) The Court may from time to time appoint any one or more of the creditors or contributories to represent before the Court at the expense

of the company all or any class of the creditors or contributories upon any question or in relation to any proceedings before the Court and may remove the person so appointed.

(4) If more than one person is appointed under this rule to represent one class the persons appointed shall employ the same solicitor to represent them.

It becomes abundantly clear on a plain reading of paragraph (1) of r. 64 that only a person on the list of contributories of the company or a person whose proof of debt has been admitted is at liberty at his own expense to attend proceedings in relation to the winding up of a company by the Court, and such person is entitled to have notice of all such proceedings as he shall by written request require upon payment of the costs occasioned thereby. The contention of the petitioner that it was entitled as of right to have notice of the application by the liquidators and to be heard before the order of 31 March 1992 was made flies in the face of this provision. Even as a contributory or proven creditor of the company, the petitioner would have had to make a written request to be given notice of the proceedings and it would only receive such notice upon payment of the costs occasioned thereby.

Rule 64 read as a whole makes it clear that the contributories and creditors of the company are generally not required to attend or participate in the winding-up proceedings unless required to do so by the Court. It is intended by this provision to prevent further dissipation of the assets of the company through the incurring of additional expenses and costs. This of course does not detract from that part of s. 236(3) which enables any creditor or contributory to apply to the Court with respect to the exercise or proposed exercise of any of the powers of the liquidator under that section.

It cannot be gainsaid that the petitioner sought to become a creditor of the company when it presented its proof of debt to the liquidators in accordance with the winding-up procedure applicable. This proof of debt was with reference to the claim in the civil suit for damages for an alleged breach of contract. However, the affidavit of Chong Ah Goh supporting the proof of debt submitted to the liquidators stated that the company was justly and truly indebted to the petitioner in the sum of RM1,585,850.60 **for goods supplied and services rendered** (emphasis added) as shown in the details of claim which was annexure "A" to that affidavit (see the affidavit in reply of Ong Kong Lai enclosure (52) and exhibit "OKL-2" thereto). But the details of claim in annexure "A" show something very different from goods supplied and services rendered. They relate to loss of business through cancellation of customers' orders, difference in price and expenses incurred in necessary tooling fabrications.

Also attached to annexure "A" was the amended statement of claim in the civil suit. In it the petitioner admitted owing the company a sum of RM507,949.36 and contended that it did not pay the sum when due on account of the stopping in the supply of battery casings by the company. It intended to set-off this sum against the loss and damage suffered by it through the company's breach of contract.

By a letter dated 13 December 1991 (see exhibit "OKL-3" to enclosure (52)), the liquidators rejected wholly the petitioner's proof of debt on the following grounds:

(1) that the company did not have any records of goods supplied and services rendered by the petitioner;
(2) the affidavit of Chong Ah Goh did not substantiate nor support the alleged transaction.

The letter also gave notice to the petitioner "that subject to the power of the Court to extend the time, no application to reverse or vary our decision in rejecting your proof will be entertained after the expiration of 21 days from this date". It was signed by Wong Cham Mew as liquidator. It will be recalled that Mr. Pathmanathan had contended that this letter signed by one of the two liquidators rejecting the proof of debt was not a joint act of the liquidators and therefore proof of debt was not lawfully rejected. With respect, I am unable to agree as the letter is couched in clear terms that it was conveying the decision of the liquidators made jointly.

When the petitioner received this notice rejecting its proof of debt, its solicitors replied that "as the matter had already been pursued in the High Court, we feel that it will not be necessary for our clients to appeal against your decision to reject their proof of debt".

I make no comment as to whether the liquidators' decision to reject the proof of debt was correct in the circumstances as the petitioner did not apply to the Court to reverse that

decision. The right of any person aggrieved by the act or decision of the liquidator to apply to the Court, which may thereupon confirm, reverse or modify the act or decision complained of and make such order as it thinks just, is contained in s. 279. The mechanism for a creditor or contributory to make such an application in relation to a proof of debt is contained in r. 93.

An application to the Court against the liquidator's rejection of a proof of debt is a hearing *de novo* and either party is entitled to adduce fresh evidence in support of his contention: see **The Law of Company Liquidation** by the Hon. Mr. Justice B H McPherson, third edition by J O'Donovan at p. 390, and rr. 94 and 95.

The question for decision then was whether in the circumstances the petitioner was able to succeed in its two applications on the merits. I was of the view that both the applications should be dismissed. Insofar as the second application (enclosure (49)) was concerned, the petitioner lacked the necessary *locus standi* to make it and further was not entitled to apply to set aside the order of the Court of 31 March 1992 as that order was not made *ex parte* the petitioner. The reasons for my so deciding have been set out earlier in this judgment. With respect to the first application (enclosure (33)), I found that the very arguments of convenience, the saving of time, expense and costs put forward on behalf of the petitioner militated against its cause.

It was the petitioner which presented the petition and also instituted the civil suit against the company while the petition was pending hearing. The reasons for applying for the winding up of the company through the petition and the instituting of the civil suit had certain features in common, namely, the alleged failure of the company to supply lead inserts and battery casings as mutually agreed upon and the claim for damages against the company arising from that alleged failure.

Section 222 provides for the Court to stay or restrain proceedings in a pending action or proceeding against the company on application by the company or any creditor or contributory after the presentation of a winding-up petition and before a winding-up order has been made. Section 226(3) prohibits an action or proceeding to be proceeded with or commenced against the company except by leave of the Court and in accordance with such terms as the Court imposes when a winding-up order has been made or a provisional liquidator has been appointed. Rule 163 empowers the Judge by whom an order has been made for the winding up of a company to order the transfer to him of any action, cause or matter pending, brought or continued by or against the company.

The philosophy behind these provisions in the law relating to companies for pending actions or proceedings to be stayed (s. 222), for leave to be obtained before proceeding with or commencing an action or proceeding (s. 226(3)) and for the transfer to the winding-up Court of the action, cause or matter pending, brought or continued by or against the company (r. 163) is to bring into one forum all actions and proceedings against the company so that they can conveniently and expeditiously be dealt with, while minimising costs, and prevent a multiplicity of actions which may result in the assets of the company being dissipated. This is "the winding-up workshop" referred to in *Re Canada Western Steel Co.* [1922] 69 DLR 689.

In *Mosbert Bhd. (In Liquidation)*, Seah SCJ (as he then was) in delivering the judgment of the Supreme Court had this to say at p. 447 of the report:

> ... it cannot be disputed that the primary object of winding up is the collection and distribution of the assets of the company *pari passu* amongst unsecured creditors after payment of preferential debts. And the purpose of the statutory provision is to ensure that all claims against the company in liquidation which can be determined by the cheap and summary procedure available in a winding up are not made the subject of expensive litigation. The provision is designed to prevent unnecessary multiplicity of suits which may result in dissipating the assets of the company.

On the question of obtaining the leave of the Court to commence or proceed with an action or proceeding, he ruled:

> In *re Cuthbert Lead Smelting Co. Ltd* [1886] WN 84 it was held that if the applicant could obtain all the relief in the winding up leave would be refused. In short, the Court will always give an applicant leave if his claim cannot be dealt with adequately in the winding up or if the remedy he seeks cannot be given to him in a winding up proceedings.

In the present case it was argued for the petitioner that leave should be granted to proceed with the civil suit as the petitioner had deliberately not wanted to pursue the remedy available to it by applying to the winding-up Court under r. 93 when its proof of debt had been rejected by the liquidators. It had instead opted to proceed with its claim in the civil suit. I pause here to say that this plank of the argument for the petitioner is not consistent with its oral application to the Court to extend the time for appealing under r. 93 and is sufficient reason alone for the Court not to allow the extension of time sought.

Having set the winding-up machinery in motion, the petitioner had to face the consequences of its action. If it had indeed wanted to proceed with the civil suit, it could have withdrawn the petition before the winding-up order was made. I make no comment as to whether in its capacity as a contributory of the company it could have applied for a conditional stay of all proceedings in the winding up under s. 243(1) until the disposal of the civil suit. However, neither of these steps was taken.

Reference may be usefully made to the effect which a compulsory winding up has on actions and proceedings, as commented upon in **The Law of Company Liquidation** at pp. 180-182:

> One consequence of the mere filing of an application for the winding-up order is that it enables a creditor or contributory to obtain a stay of any action or other civil proceeding pending against the company. But if no stay is obtained, proceedings against the company may be continued until such time as a winding-up order is made or a provisional liquidator appointed. When this occurs, however, all proceedings are automatically stayed under s. 371(2) which provides that no action or other civil proceedings shall be commenced or proceeded with against the company except by leave of the Court and in accordance with such terms as are imposed by the Court.
>
> ...
>
> ... The real justification for s. 371(2) is to be found elsewhere. Its purpose is to avoid the inconvenience and expense of litigation and to oblige all claimants to submit to the procedural scheme established in winding up. In the words of a Canadian Judge:
>
> > It must be kept in view that the intention of the Winding Up Act and of all legislation respecting insolvency is to get within the control of the Court all the estate of the insolvent company, to settle there all the claims of debt, privilege, mortgage, lien, or right of property upon, in or to any effects or property of such company in the simplest and least expensive way, and to distribute its assets among its creditors in the most expeditious manner possible and not to have the proceedings of the winding up Court or the distribution of the assets delayed or impeded by or dependent upon outside or expensive litigation in other Courts.

Towards avoiding such "outside or expensive litigation in other Courts", r. 163 provides for the transfer to the winding-up Court of any action, cause or matter pending, brought or continued by or against the company.

The petitioner had already filed the civil suit against the company when it proceeded to submit its proof of debt to the liquidators pertaining to the same subject-matter as in the civil suit and upon which the petition was also based. Upon the proof of debt being rejected, it was open to the petitioner to apply to the Court under r. 93 to reverse the decision of the liquidators. The nature of the petitioner's claim in the civil suit *vis-a-vis* the nature of the debt sought to be proved in the winding-up proceedings pointed to the balance of convenience and the demands of justice being with the petitioner pursuing its remedy in the winding-up Court.

In *Craven*, a director of a limited company, which went into voluntary liquidation, put in a proof in the liquidation in respect of arrears of salary and damages for dismissal. The liquidator allowed the proof. The director being dissatisfied with the amount awarded to him brought an action for damages against the company in the King's Bench Division. The company applied for a stay of the action on the ground that the director, if dissatisfied with the liquidator's decision, should appeal to a Judge in the Chancery Division. The Judge refused to stay the action. The company appealed. It was held:

(i) a creditor who has selected one method of having his claim adjudicated upon, which gives him the right to question the decision, ought not then to be in a position to select another method of adjudication;
(ii) in any event a decision in the action would have no result, as the liquidator's adjudication, until reversed by a Judge in the Chancery Division, would be binding in the winding up;
(iii) the action ought to be stayed.

The judgment of Greer LJ in *Craven* at pp. 515-516 of the report is very much in point:

> ... It seems to me, on general principles, that a person who selects one method of having his claim adjudicated upon, if he is dissatisfied with the way in which that adjudication has been decided, should not be allowed to select another method of having it adjudicated. It is common knowledge in these matters that the Court does not allow two sets of proceedings to go on at the same time in the same matter; it will stay either one or the other in order that there may not be a waste of costs in asking two tribunals to decide the same question.
>
> So far as I am concerned, I do not think it is necessary to go into the various sections and rules that have been referred to. I think it sufficient to say that the respondent in this case, having selected one method of having his claim adjudicated upon, which gives him the right to question the decision of the liquidator, ought not then to be in a position to select another method which, in my judgment, would have no result because, even if Hilbery J. gave him a larger sum than the liquidator had given him, the adjudication by the liquidator would still remain an adjudication which, until it was reversed by a Judge in the Chancery Division, would have been binding in the winding up.

In the present case, as the petitioner could obtain the relief it sought in the civil suit in the winding-up proceedings and as it chose so to do by submitting its proof of debt to the liquidators, leave to proceed with the civil suit should be refused.

Accordingly, for the reasons given, the first (enclosure (33)) and second (enclosure (49)) applications of the petitioner were dismissed with costs.

Mr, Terrance Marbeck for the petitioner who on 4 August 1992 appeared to receive the oral judgment in this case applied for a stay of the order of the Court for the distribution of the company's assets pending appeal. This was objected to by Miss P S Khoo for the liquidators and Mr. David Morais for the interveners on the ground that no special circumstances were shown to warrant a stay. Having heard the arguments advanced, I granted the stay applied for pending appeal.

On an application made on behalf of the interveners for further arguments to be heard in open Court, I so heard further arguments on 19 August 1992 and reserved decision to today.

The arguments advanced by Mr. Marbeck that should the stay not be granted and the assets of the company be distributed to the shareholders, the appeal would be rendered nugatory should the petitioner succeed and the petitioner would therefore suffer irremediable injury do not constitute special circumstances as laid down in the authorities on this question. These are arguments that could be raised in most situations. However, in the present case, my order of 4 August 1992 to grant a stay of the distribution of the company's assets among the shareholders pending appeal is to remain. This is because the assets of the company in the form of monies which have been realised have in accordance with law been deposited into an interest-bearing account by the liquidators. The balance of convenience dictates that they so remain. The order for stay in these circumstances will not be to the detriment of the shareholders, who are also the interveners, should the appeal not succeed. They will be compensated for the delay in the distribution of the company's assets occasioned by the appeal through the interest that the assets will earn in the interim. I therefore make an order accordingly.